



www.HRhero.com

CALIFORNIA

EMPLOYMENT LAW LETTER

Part of your California Employment Law Service

Mark I. Schickman, Editor
Cathleen S. Yonahara, Assistant Editor
Freeland Cooper & Foreman LLP

Vol. 21, No. 8
July 25, 2011

What's Inside

Mark's In Box

Despite movie's take on the subject, workplace violence is no laughing matter 3

Wage and Hour Law

California court clarifies when split-shift pay is owed to workers 4

Class Actions

Disgruntled employees fail to get class certified — is this a trend? 5

The Public Sector

What will your company's budget look like in 2012? The time to plan is now 7

Agency Action

Employer pays almost \$700K for cutting wages without union bargaining 9

On HRhero.com

Drug Testing

Employee drug use can lead to a host of problems for employers — from safety issues to absenteeism to theft. Before you implement a drug-testing policy, go to www.HRhero.com, where you can find the following tools to help ensure your policy follows the law:

- HR Sample Policy — Drug-Free Workplace and Substance Abuse, www.HRhero.com/lc/policies/206.html
- HR Sample Policy — Preemployment Drug Screens, www.HRhero.com/lc/policies/302.html

© M. Lee Smith Publishers LLC

OVERTIME

Court affirms overtime protections for all individuals working in state

by Michael Futterman and Jaime Touchstone

Out-of-state employees sued software giant Oracle Corporation, charging that it didn't pay them overtime for work performed in and outside of California. The employees sought unpaid overtime wages under California's overtime and unfair competition laws. The Ninth U.S. Circuit Court of Appeal (which covers California) declined to issue an opinion, instead requesting assistance from the California Supreme Court. The supreme court found that out-of-state employees working in California for a California-based employer are entitled to the protections of California's overtime laws.

Oracle sued for failing to pay overtime

Donald Sullivan, Deanna Evich, and Richard Burkow worked as non-resident instructors for Oracle, which is headquartered in California. Sullivan and Evich live in Colorado, and Burkow lives in Arizona. As instructors, Sullivan, Evich, and Burkow trained Oracle's customers to use the company's products. They worked mainly in their home states but occasionally traveled to and worked in California and other states.

For at least three years, Oracle classified its instructors as exempt teachers and didn't pay them overtime. In 2003,

in-state and out-of-state instructors filed a class-action lawsuit alleging that the company had misclassified them and thus violated the law by not paying them overtime. In response, Oracle reclassified its California-based instructors and began paying them overtime, thus settling their claims. The nonresident instructors proceeded with their lawsuit claiming:

- (1) in accordance with California overtime laws, they should be reimbursed for overtime hours worked (hours worked in excess of eight hours per day or 40 hours per week) in California;
- (2) Oracle's failure to pay overtime for work performed in the state was a violation of the California Unfair Competition Law (UCL); and
- (3) under the UCL, Oracle also was required to reimburse them for overtime worked in states other than California.

The federal district court ruled in Oracle's favor, and the nonresident instructors appealed to the Ninth Circuit. Given the large number of California employers that use out-of-state employees to perform work in California and the implications of allowing those employers to avoid California overtime regulations, the Ninth Circuit asked the California Supreme Court to determine the validity of the nonresident

Freeland Cooper & Foreman LLP
is a member of the *Employers Counsel Network*





**CALIFORNIA
EMPLOYMENT LAW LETTER**

Vol. 21, No. 8

Mark I. Schickman, Editor

Freeland Cooper & Foreman LLP, San Francisco
(415) 541-0200 • schickman@freelandlaw.com

Cathleen S. Yonahara, Assistant Editor

Freeland Cooper & Foreman LLP, San Francisco
(415) 541-0200 • yonahara@freelandlaw.com

Advisory Board of Contributors:

Steven R. Blackburn

Epstein Becker & Green, P.C., San Francisco
(415) 398-3500 • sblackburn@ebglaw.com

Jim S. Brown

Sedgwick, Detert, Moran & Arnold LLP,
San Francisco
(415) 781-7900 • james.brown@sedgwicklaw.com

Michael Futterman

Futterman Dupree Dodd Croly Maier LLP,
San Francisco
(415) 399-3840 • mfutterman@fdcm.com

Jonathan V. Holtzman

Renne Sloan Holtzman Sakai LLP, San Francisco
(415) 678-3807 • jholtzman@publiclawgroup.com

Robin Weideman

Carlton DiSante & Freudenberger LLP, Sacramento
(916) 361-0991 • rweideman@cdflaborlaw.com

Lyne Richardson

Ford & Harrison LLP, Los Angeles
(213) 237-2400 • lrichardson@fordharrison.com

Production Editor:

Alan King, aking@mleesmith.com

CALIFORNIA EMPLOYMENT LAW LETTER (ISSN 1531-6599) is published biweekly for \$547 per year by **M. Lee Smith Publishers LLC**, 5201 Virginia Way, P.O. Box 5094, Brentwood, TN 37024-5094. Copyright 2011 M. Lee Smith Publishers LLC. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

The contents of **CALIFORNIA EMPLOYMENT LAW LETTER** are intended for general information and should not be construed as legal advice or opinion. To request further information or to comment on an article, please contact one of the editors listed above. Readers in need of legal advice should retain the services of competent counsel. The State Bar of California does not designate attorneys as board certified in labor law.

For questions concerning your subscription, **www.HRhero.com**, or Corporate Multi-User Accounts, contact your customer service representative at (800) 274-6774 or custserv@mleesmith.com.

instructors' claims. The supreme court ruled for the nonresidents on two of the three claims.

Supreme court rules out-of-state workers deserve overtime, too

When read literally, California's overtime laws apply broadly to "any work" performed by "any employee" working in the state and to "all individuals" employed in the state without regard to their place of residence. Payment of overtime compensation is mandatory, and the failure to pay overtime is a crime, evidencing California's strong public-policy goals of protecting the health and safety of workers from the "evils associated with overwork." Consistent with this strong public policy, California affords far more overtime protection to workers than many other states, including Colorado — whose overtime law governs only work performed in Colorado — and Arizona, which has no overtime law.

To save money, Oracle sought to pay its nonresident instructors' wages under the less-rigorous overtime laws of their home states. It argued that because labor laws vary from state to state, requiring employers to apply California's wage laws to nonresident employees imposes undue burdens on employers and on interstate commerce in general. But the California Supreme Court disagreed, finding that California's strong public-policy goals would be thwarted if a nonresident employee of a California employer, such as Oracle, were required to work in California without the protection of the state's labor laws.

Excluding nonresidents from California's overtime laws only encourages employers to hire unprotected out-of-state workers to avoid paying overtime, thus threatening the growth of the state's job market. The California Labor Code therefore applies to overtime work performed by nonresident employees in California for a California-based employer. Thus, Oracle must pay its nonresident instructors overtime for work performed in excess of eight hours per day or 40 hours per week within the state.

Failure to pay overtime can constitute unfair competition

The UCL prohibits unlawful business acts or practices by California employers. The nonresident instructors argued that by failing to pay its employees legally required overtime compensation, Oracle engaged in unlawful business practices and was therefore required to pay overtime for work performed in both California and other states. The nonresident instructors sought to apply the UCL to their out-of-state claims because the law has a longer statute of limitations than the federal Fair Labor Standards Act, which governs federal wage claims.

The California Supreme Court held that although the UCL applies to unfair practices committed in California, it doesn't apply to conduct in other states. The nonresident instructors argued that Oracle's decision not to pay overtime was made at its California headquarters and therefore was California conduct. But the supreme court disagreed, finding that the allegedly illegal conduct was the company's failure to pay overtime for work performed out of state. There was no evidence that the same failure occurred within the state. As a result, the UCL did not apply to the instructors' out-of-state wage claims. *Sullivan v. Oracle Corporation* (California Supreme Court, 6/30/11).

continued on pg. 4

July 25, 2011

continued from pg. 2

Bottom line

This decision should serve as a reminder to employers that California labor law furnishes broad protections to individuals who perform work within the state, regardless of where they may reside. As with many other state laws, it makes California an expensive place to do business. Of course, it's a price many employers are willing to pay for access to California's lucrative markets.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com. ❀